



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

March 10, 2004

Mr. Lawrence G. Provins  
Assistant City Attorney  
City of Pearland  
3519 Liberty Drive  
Pearland, Texas 77581-5416

OR2004-1813

Dear Mr. Provins:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 197404.

The City of Pearland (the "city") received a request for "non-proprietary GIS data from the Clear Creek Watershed Study, performed after Tropical Storm Allison. . . ." You take no position regarding whether the requested information is proprietary, but instead have notified four interested third parties of the request for information and of their opportunity to submit comments to this office.<sup>1</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

At the outset, we address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body that wishes to withhold information from public disclosure must request a ruling from this office not later than the tenth business day after the date of receiving the written request. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written

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<sup>1</sup>The third parties that received notice pursuant to section 552.305 are TerraPoint, Brazoria Drainage District No. 4, City of Friendswood, and Galveston County Consolidated Drainage District.

comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D).

You inform us that the city received the request for information on December 8, 2003. You did not request a decision from this office until December 31, 2003. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(b) of the Government Code. Furthermore, the city submitted the information at issue on a computer diskette ("CD"). After attempts by this office to access and view the information on the submitted CD, we determined that we were unable to view or access any of the information on the CD. Therefore, this office contacted you by facsimile transmission and by telephone in an attempt to have you submit the information contained on the CD in paper format. However, as of the date of this ruling, this office has not received any information in paper format from you. Section 552.301 of the Government Code requires the governmental body to submit the requested information to this office in a manner that permits us to decide whether the information is excepted from disclosure. By submitting a CD containing inaccessible information, you made it impossible for this office to review that information. Thus, we find that the city failed to comply with section 552.301 of the Government Code with respect to the information at issue.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information at issue is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling demonstration is made when a governmental body shows that the information at issue is confidential by law or its release would implicate a third party's interests. Since you claim that the release of the requested information may implicate third party interests, we will address this issue.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, all of the interested third parties failed to submit to this office reasons explaining why their information should not be released. Therefore, these entities have provided us with no basis to conclude that they have a protected proprietary interest in any of the requested information. *See Gov't Code*

§ 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, because we have not been presented with a compelling reason to withhold the information, we find that the information at issue must be released to the requestor in accordance with section 552.302.

You indicate, however, that the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Thus, in releasing the requested information to the requestor, you must do so in compliance with the applicable copyright law for any copyrighted information that may be contained within the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

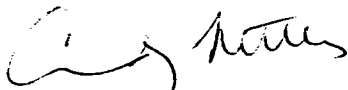
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 197404  
Enc. Submitted documents

c: Mr. Anthony Holder  
Thompson  
6110 Clarkson Lane  
Houston, Texas 77055  
(w/o enclosures)

c: TerraPoint  
25216 Grogans Park Drive  
The Woodlands, Texas 77380  
(w/o enclosures)

Brazoria Drainage District No. 4  
4805 West Broadway  
Pearland, Texas 77581  
(w/o enclosures)

City of Friendswood  
416 Morningside  
Friendswood, Texas 77546  
(w/o enclosures)

Galveston County Consolidated Drainage District  
1301 West Parkwood  
Friendswood, Texas 77546  
(w/o enclosures)